

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 505 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MADHUSUDANBHAI JAMNADAS SHAH

Versus

KIRITBHAI CHIMANLAL SHAH

Appearance:

MR SR SHAH for Petitioners

MR HM PARIKH for Respondent.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 21/11/98

ORAL JUDGEMENT

Being aggrieved by the order dated 28th September 1998 passed by the learned 8th Joint Civil Judge (S.D.) at Nadiad, below interim injunction application Ex. 5 preferred in Special Civil Suit No. 141/98 on his file whereby interim injunction came to be granted, the original defendants have preferred this appeal.

2. Few facts which led the appellant to prefer this appeal may be stated. The appellants are the defendants and respondent is the plaintiff in Special Civil Suit No.

141/98. I will be referring the parties as per their original status. There is a cinema house known as 'Navratna Cinema' at Khambhat, the owner of which is the plaintiff. He entered into a contract with defendants on 1st April 1987. As per that contract whatever films were to be sent by the defendants the plaintiff had to exhibit the same in his cinema house. For such exhibition, the plaintiff was entitled to recover Rs. 20,000/- per month from the defendant. The defendants were under the contract bound to make the payment of Rs. 20,000/regularly, but for the last 9 months they have not made the payment, with the result Rs. 1,80,000/- have become due. The plaintiff also came to know that the defendants were not paying the entertainment tax to the Government though they have collected the same. On both the grounds the plaintiff was therefore constrained to terminate the contract giving 7 days notice. The period of seven days expired on 28th August 1998. From that day the contractual obligations came to an end and the contract ceased to operate. However, the defendants sent the film called 'Janata Ki Adalat' for exhibition. As the contract was terminated the plaintiff was under no obligation to accept the film and exhibit the same in the cinema house. The defendants were having no right for insisting on the exhibition thereof. However, they attempted to obstruct the plaintiff from exhibiting other films and instructed the employees of the cinema house not to cooperate. They any how want to exhibit the film called 'Janata Ki Adalat'. The plaintiff was therefore constrained to file the suit in the Court of the Civil Judge (S.D.) at Nadiad for injunctive relief. The same is registered as Special Civil Suit No. 141/98 wherein the plaintiff also filed ad-interim injunction application praying to restrain the defendants from exhibiting any film in the cinema house on and from 21.8.98 and also from disturbing him from exhibiting his films. The learned Joint Civil Judge (S.D.), to whom the suit was assigned, hearing the parties allowed the injunction application and granted the temporary injunction as prayed for. It is against that order, the present appeal is filed by the defendants.

2. Assailing the impugned order the learned advocate representing the appellants contends that the termination of the contract is bad in law. The contract is for 260 weeks. There is no provision in the contract empowering the plaintiff to terminate the same before the period of 260 weeks expires. Only in one case, the plaintiff is entitled to terminate the contract. Under Clause 5 of the contract, the plaintiff is at liberty to terminate the contract giving a week's notice provided he wants to

sell, lease, mortgage, assign, alienate or transfer the cinema house. In no other case, the plaintiff has a right to terminate the contract. The plaintiff in this case has neither sold, leased, mortgaged, assigned, alienated or transferred the cinema house nor is going to sell, lease etc. Clause 5 of the contract therefore does not come into play. It is also the submission that the defendants are ready to make the payment of the amounts due and would go on paying the amounts regularly every month which they are under contractual obligation to pay. My attention was drawn to some of the decisions in support of the contention raised. It may be stated here that the contentions are advanced assuming that the contract in question is a contract granting licence. The High Court of Bombay in the case of M.F. De Souza vs. Childrens Education Uplift Society - AIR 1959 Bombay 533 has held keeping Section 60 of the Indian Easement Act in mind that not only in two classes of cases mentioned in Section 60 the licence is made irrevocable. Under the contract entered into if the licence is made irrevocable or is made operative for a particular duration, the licensor is bound by his solemn agreement and will not be entitled to terminate the licence or revoke the licence at his sweet will and pleasure. In this case, when duration of 260 weeks is fixed, and Clause 5 of the agreement does not come into play it was not open to the plaintiff to terminate the licence. The licence is however terminated before the expiry of the said period. Such termination is illegal being contrary to the contract entered into.

3. According to Mr. Shah, learned advocate for the defendants, the Allahabad High Court in the case of Babu Fazal Haq and others vs. Lala Data Ram and another - AIR 1975 Allahabad 373, has also made it clear that when the licensor agrees to permit his property to be enjoyed by the licensee for a particular period he is bound by the said agreement and cannot before the said period expires terminate the licence and remove the licensee from the premises on the ground that the latter had no right to remain in the premises. The decision in the case of Biswanath Panda vs. Gadadhar Panda - AIR 1971 Orissa 115 also lays down that a licence simpliciter is irrevocable at any time but when the contract thereof grants the right to use the property for a particular period, and grantor restricts his right to enjoy for the said period the contract becomes irrevocable before that specific period expires. Placing reliance on a decision rendered in the case of American Cyanamid Co. vs. Ethicon Ltd (1975) 1 All England Law Reports 504, Mr. Shah the learned advocate for the defendants further contends that

establishment of prima facie case, or balance of convenience is not always necessary for the court to consider whether interlocutory injunction should be granted. All that is necessary is that the court should be satisfied that the claim is not frivolous or vexatious i.e. that there is a serious question to be tried. He further contends that the care should be taken while granting the interim injunction that the breach of law, or breach of contract is not permitted by the court but prevented. Here in this case by granting the injunction the lower court on the contrary permitted the breach of contract rather than restraining the plaintiff from committing the breach. Equity therefore cannot side the plaintiff. In this case serious & important questions of law have arisen for consideration. Till they are adjudicated finally it was not just & proper on the part of the lower court to grant interim relief.

4. In reply to such contentions, Mr. Nanavati, learned Sr. counsel for the plaintiff submits that all the contentions raised are the result of misreading of the contract and misconception of law. The contract in question is not the contract granting licence, but it is simply a commercial contract. The plaintiff had a right to terminate the contract when the defendants were not performing their part of contract, namely payment they were bound to make every month. After the contract was terminated, no right in favour of the defendants survived. On the contrary, the plaintiff acquired the right to use the cinema house peacefully. He had therefore a right to seek appropriate relief if his right to have peaceful enjoyment was being invaded. Even if the contract is treated to be the contract for the licence, the plaintiff cannot gain a ground to stand upon. By issuing the notice licence has been terminated. Consequently, the remedy for the licensee would be to claim damages. It is now not open to the defendants to set the clock back to the position that existed prior to the termination of contract.

5. It may be mentioned at this stage, that though this is the appeal against the interim relief granted, virtually, the same should be treated to be the revision and therefore the scope of my enquiry is limited. The merits of the rival contentions are to be dissected for a limited purpose of satisfying that the decision of the lower court is in accordance with law. In other words to correct the errors of law the jurisdiction is to be exercised. Recording of a different conclusion on facts can never be the matter which would fall within the realm of errors of law. Ordinarily therefore I should desist

from interfering with the exercise of discretionary powers by the lower court even if I am of differring opinion on the question of fact and substitute my view holding that the same is better than what out of two possible conclusions the lower court has preferred to take. I can however interfere in the exercise of discretionary powers only if it is found that the appreciation of the evidence made and the conclusions drawn are arbitrary, perverse, illogical or wholly in disregard of sound principles of law. In short I can investigate or dissect only for the purpose of satisfying that the decision is in accordance with law, and on record there is no error or manifest perverse finding apparent on the face of record calling for prompt redressal, and for securing the ends of justice.

6. The party seeking temporary injunction has to show that he is having a prima facie case. In order to establish the prima facie case, the party has to show that he is having a legal right and his such right is being invaded or likely to be invaded. It may be stated that establishment of the prima facie case is not enough. It should also be shown that because of invasion from the other side he will sustain loss which would be irreparable; and the hardship he would be sustaining would be greater than what the other side would in case relief is refused. In short the party has to satisfy the triple tests namely (1) prima facie case, (2) irreparable injury and (3) balance of convenience. The learned Judge below has found that the plaintiff has succeeded in satisfying the triple tests. Keeping my scope of inquiry in this appeal I will examine whether interference in the order passed is warranted.

7. Whether the contract in question is the contract of licence or the commercial contract simpliciter is the point raised, but at this stage it would not be just and proper to give legal complexion to the issue raised which can best be done while disposing of the suit finally after hearing the parties on merits.

8. It is pertinent to note that the plaintiff has terminated the contract giving 7 days' notice about which there is no dispute. What is disputed is plaintiff's right to terminate the licence or contract. Contending as stated hereinabove, what is sought to be impressed by the learned advocate for the defendants is that under Clause 5 of the contract the termination is contingent on the happening of the event specified therein and not otherwise. As the specified event has not happened, the plaintiff did not acquire a right to terminate the

contract. With no option left, the contract remained irrevocable until the period of 260 weeks which began to run from 1-4-1997 expires. In this case thus substantial question of law namely right to terminate the contract or revoke the licence has arisen and till the same is set at rest, the learned Judge below ought not to have granted interim relief. In this case therefore original position that existed prior to the date of the suit is required to be restored setting aside the impugned order.

9. Against the reliance placed on the decision of the High Court of Bombay in M.F. De Souza (Supra), the plaintiff's learned senior counsel draws my attention to the decision of this Court rendered in Jagannath Govind Shetty vs. Jayantilal Purshottamdas Patel - AIR 1980 Guj 41 wherein the view contrary to the view taken by the Bombay High Court in M.F. De Souza (Supra) is taken referring the said decision and holding that the view of the Bombay High Court is not the good law. It is held by the Division Bench of this Court placing reliance on the decision of this Court in Hanifa vs. Memon Dadu - AIR 1964 Guj. 44 that Section 60 of the Easement Act makes the licence irrevocable only in two categories mentioned vide Cl (a) and (b) to it. It does not admit 3rd category in addition to aforesaid two namely agreement for making contract irrevocable, because the intention of Legislature appears to be amply clear by Sec. 64. Before the expiry of the contractual term if the grantor evicts a grantee, the course open to the grantee is to claim compensation from the grantor. In view of such decision of this Court in the case of Jagannath Govind Shetty (Supra), it was open to the plaintiff to terminate the licence. The period of 260 weeks fixed for the above stated use of the cinema house will not be the impediment in plaintiff's way for terminating the licence as it will not be falling within the ambits of Sec. 60 Indian Easement Act which contemplates only two categories namely (a) licence is coupled with a transfer of property and such transfer is in force and (b) the licensee acting under the licence has executed a work of permanent character and incurred expenses in the execution for making the licence irrevocable. In this case both the categories do not come into play. The term of the contract fixing a duration to use or enjoy not recognised by Sec. 60 of the Easement Act nor made one of the classes of cases making the licence irrevocable cannot be held to be the governing factor qua termination of licence. The plaintiff was even free to terminate the licence at his sweet will or pleasure though of course for the reason stated hereinbelow the plaintiff had a good cause to terminate the licence, and it was not

necessary to wait till the contractual period of 260 weeks expired. The contention that the licence is irrevocable and termination of licence is bad in law therefore does not gain a ground to stand upon.

10. Faced with such situation, Mr. Shah the learned senior advocate for the defendants contends that the decision of this Court in Jagannath Govind Shetty (Supra) may be held to be impliedly overruled and view of the Bombay High Court in M.F. De Souza's case may be held to be the good & binding law because subsequently when the likewise question arose before the Supreme Court in Ram Sarup Gupta (decd) by L.Rs. vs. Bishun Narain Inter College and Others - AIR 1987 SC 1242, it is made clear that the decision of the Bombay High Court in M.F. De Souza (Supra) taking the view that the parties may inserting the term in the contract make the licence irrevocable for a particular duration laid down the correct law. In that case the Supreme Court has thus approved & affirmed the view of the Bombay High Court.

11. It is difficult to accept the contention. The Supreme Court has, in K. Sahadev vs. Sureshbir (1995) Supp. 3 S.C.C. 668, laid down that a decision of the High Court cannot be said to have been impliedly overruled by the decision of the Supreme Court. If the High Court holds that a particular provision in a particular Act is unconstitutional unless the same is set aside by a larger Bench of that Court, the same would not stand nullified automatically by a decision of the Supreme Court upholding a similar decision in another Act. Likewise view is also reiterated by the Supreme Court in the case of Somabhai Mathurbhai Patel Vs. New Shorrock Mills - 1983 G.L.H. 273. What is made clear is that when the Supreme Court takes a contrary view in another case than the view taken by the High Court in a particular case, the decision of the High Court does not impliedly stand overruled. It cannot therefore as canvassed be said that the decision of the Bombay High Court in M.F. De Souza (Supra) having the binding force on this court as being the decision prior to the State of Gujarat came to be formed on 1-5-60, stood restored with the same fervour & vigour, and the decision of this Court in Jagannath Govind Shetty (Supra) impliedly stood reversed.

12. For the sake of argument in the alternative if it is believed that the view of the Bombay High Court approved & affirmed by the Supreme Court prevails, and the decision of this Court in the case of Jagannath Govind Shetty because of the decision of the Supreme

Court stood impliedly overruled the defendants do not gain a ground to stand upon. When the opposite party to the contract commits the breach of contract or goes on committing the breach and flouts his contractual obligation, the party who adheres to his contractual obligations sincerely or performs his part of contract is not in law precluded from terminating the contract even before the contractual period expires for the law does not say that the party adhering to his contractual obligations should sitting on his hands go on maintaining the contract and undergo the loss or damage feeling helpless. In other words, irrevocability of the contract owing to duration for performance having been specified subsists so long as the party claiming a right under the contract honestly performs his part of contract. Admittedly the defendants who have to pay Rs.20,000/- every month to the plaintiff have not paid the dues for the last 9 months and Rs. 1,80,000/- have become due. During the pendency of the suit also no payment is made. When the defendants have thus committed the breach of contract, the plaintiff had a right to terminate the contract or revoke the licence despite the duration of 260 weeks fixed, and irrevocability because of specified time ceased to operate. Viewed accordingly, the termination of contract or revocation of licence cannot be said to be high-handed or illegal as canvassed.

13. From what is discussed hereinabove, it is clear that either the contract is terminated or the licence is revoked. Be that as it may, the defendants' rights or interest came to an end and plaintiff acquired absolute right to use the cinema house peacefully in the way he likes without any obstruction or hostile claim from defendants. To put in different words plaintiff's ownership right & interest in cinema house which were owing to the impugned contract made restrictive, on termination of the contract came to be restored into full right without any limitation or obstruction or rival claim to use & occupy the cinema house as the owner. If such right is invaded or likely to be invaded he has a right to seek appropriate relief inclusive of temporary and/or permanent injunctive relief. The defendants in this case insist that the plaintiff must exhibit the films they send or will send till the period of 260 weeks expires. They thus want to disturb the right of the plaintiff. After the contract is terminated the defendants, till all the issues that arise for consideration are finally set at rest, cannot insist that the plaintiff must go on performing his part and original position that existed prior to the date of the suit must be restored. The learned Judge below therefore cannot be

said to have fallen into error in holding that the plaintiff has established a prima facie case. His appreciation of evidence on record cannot be said to be arbitrary or perverse.

14. The contention as to irreparable injury that if the defendants are not permitted to exhibit the films for rest of the period of 260 weeks they would sustain heavy financial loss and their investment of Rs. 2,00,000/= made for false ceiling and maintenance of the furniture etc. in the cinema house, would be wasted, cannot be accepted. If it is found that by the contract in question licence was granted, it would be open to the defendants to claim damages under Section 64 of the Indian Easement Act for wrongful revocation of the licence; and if at last it is found that the contract was simply the commercial contract, the remedy to claim damages for the breach of contract is available in law. In either of the cases, therefore, the defendants are not to suffer any irreparable injury. On the contrary the plaintiff would, because he would not be in a position to make profitable use of his property in the way he likes. As defendants are not paying the consideration of Rs.20,000/- every month and dues are mounting up, the plaintiff's plan will be upset and he will have not only to be despaired but will have to let go or give concession of a good round sum if persuaded and advised to be generous to the defendants. Further in future whatever is paid to him, he will not get the sum having the present rupee value. Ultimately therefore the plaintiff will have to suffer irreparable injury. At this stage, it is contended that it would not be possible for the defendants to assess the damages if they succeed at last because it would be difficult to get the proof thereof. The contention is nothing but a fallacy. On the basis of their account books and the earnings up-till-now, and if need be examining the records and books of accounts of the plaintiff defendants will be able to assess the loss. On the ground of irreparable injury the plaintiff has a better case.

15. If the temporary injunction granted by the lower court is lifted, the plaintiff will have to undergo greater hardship because though he has a right, he will not be in a position to make use of cinema house or deal with the same in the way he likes, while the defendants will not have to undergo any hardship because soon after the contract is terminated, their no right survives against the plaintiff. It should also be remembered that the management of the theatre and the possession of the theatre remained with the plaintiff. The defendants were

not even permitted to enter into the cinema house without the permission or consent of the plaintiff. Under the contract, the defendants had to procure the films and give the same to the plaintiff for exhibiting in the cinema house. When they have accordingly no right or interest in the premises or make use of the premises except getting the films exhibited through the plaintiff, they will be undergoing no hardship if injunction granted by the lower court is maintained.

16. For the aforesaid reasons, there is no merit in the appeal. The same is required to be dismissed and is accordingly dismissed.

17. At this stage, learned advocate Mr. S.R. Shah prays to grant time continuing the interim relief granted so as to approach the higher forum and obtain appropriate order. In view of such request against the operation of the order of the lower court, interim relief granted by this Court shall continue to be in force till 18th December 1998.

.....
(rmr).